EL PASO NATURAL GAS COMPANY

IBLA 98-85 Decided April 23, 2002

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, affirming an MMS order to correct deficiencies caused by underpayment of royalties for royalty-in-kind gas produced from Jicarilla Tribal Lease Nos. 609-000036-0, 609-000041-0, 609-000064-0, 609-000065-0, and 609-000066-0. MMS-94-0602-IND.

Reversed and order vacated in part.

1. Contracts: Construction and Operation: General Rules of Construction--Indians: Oil and Gas Leases: Generally--Indians: Mineral Resources: Oil and Gas Leases: Royalties

   Because a settlement agreement is a contract, the normal rules of contract construction govern its interpretation. Although Federal law controls construction, contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties.

2. Contracts: Construction and Operation: General Rules of Construction--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Mining: Royalties

   Where parties to a settlement agreement agreed to mutually release each other from any and all known or unknown obligations, claims, or causes of action that either party had asserted or could assert for any period prior to July 1, 1989, excepting only certain payment errors and discrepancies which had to be reported within 1 year of the effective date of the settlement, unless the amount claimed falls within the exception, the release will be held to extinguish any claim for additional amounts due on gas delivered prior to that date.

3. Contracts: Construction and Operation: General Rules of Construction--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Mining: Royalties

> Where a settlement agreement and mutual release requires the parties to identify and raise payment discrepancies within a stated period and a party fails to do so, all claims relating to such discrepancies will be held released and extinguished pursuant to the terms of the mutual release.

APPEARANCES: Edmund H. Kendrick, Esq., Santa Fe, New Mexico, for appellant; Triscilla Taylor, Esq., and Maria K. Wiseman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE PRICE

El Paso Natural Gas Company (El Paso) has appealed from a July 10, 1997, decision of the Deputy Commissioner of Indian Affairs (Deputy Commissioner), Bureau of Indian Affairs, denying its appeal of the September 30, 1994, order of the Minerals Management Service's (MMS') Royalty Management Program directing El Paso to calculate and pay additional amounts due (order) to the Jicarilla Apache Tribe (the Tribe) for sales of excess royalty-in-kind (RIK) gas from tribal leases 609-000036-0; 609-000041-0; 609-000064-0; 609-000065-0; 609-000066-0; and 609-000161-0 1/ accruing for the periods January 1, 1987, through June 30, 1988, and July 1, 1988, through June 30, 1994 (decision). The leases are located on the Tribe's reservation lands in the San Juan Basin in northwest New Mexico, and Conoco, Inc. (Conoco) was the operator and sole working interest owner for the subject leases. The wells on the leases were linked to El Paso's gas pipeline. El Paso contends that, to the extent MMS seeks payment of royalties which accrued prior to July 1, 1989, no money is owed because such claims are subject to a release executed by the Tribe and El Paso.

Factual Background

In 1951, El Paso entered into five leases memorialized on U.S. Department of the Interior, Bureau of Indian Affairs, Standard Lease Form 5-157 (November 1947), "OIL AND GAS MINING LEASE--TRIBAL INDIAN LANDS." Section 4(c) of the lease reserves to the Indian lessor "[t]he right to elect on 30 days' written notice to take lessor's royalty in kind." The lease contract further provides, in pertinent part:

> When paid in value * * * royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil 2/ produced is paid in kind, such

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1/ The decision modified the MMS order of September 30, 1994, to remove Jicarilla Lease No. 609-000161-0, which was not owned by El Paso during the relevant period. Accordingly, Lease No. 609-000161-0 is not at issue.

2/ This language appears in section 3(c) of Appellant's leases and, although the lease provision refers to oil, we recognize that it is also applied to gas, as does El Paso. (SOR at 15, n.2.)

> royalty shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor * * *.

In 1975, the Tribe sought a declaratory judgment against El Paso, Northwest Production Company (Northwest), and the Secretary of the Interior regarding, among other things, El Paso's royalty valuation and alleged underpayment of royalties in 1974 and 1975, as well as the Tribe's right to take RIK. Jicarilla Apache Tribe v. El Paso Natural Gas Co., et al., No. 74-128 Civil (D.N.M.). That litigation ultimately was settled by a Stipulation for Settlement agreement filed with the court on July 22, 1975 (1975 Settlement). (Exh. C to SOR.) Among other things, the 1975 Settlement required El Paso and Northwest to drill a number of wells in specified lease areas, recognized the Tribe's right to receive its royalty in kind rather than in value, and, in the event the Tribe elected to exercise that right, which it later did, required the parties to execute the Royalty Gas Gathering and Exchange Agreement (1975 Gathering Agreement) appended to the 1975 Settlement as an exhibit. (Exh. D to SOR.)

On August 22, 1975, the Tribe adopted a resolution by which it exercised its right to take its royalty as RIK, and, in accordance with the terms of the 1975 Settlement, on September 4, 1975, El Paso and the Tribe executed the 1975 Gathering Agreement to implement that election. The term of the 1975 Gathering Agreement was to be 20 years, unless modified by an amendatory agreement. (Exh. D to SOR.) Under the 1975 Gathering Agreement, El Paso was to deliver specified gas volumes to the Tribe as RIK. However, the Tribe also had the right to take less than the full amount as RIK, which it exercised by specifying the volume of RIK gas that was to be delivered to it each day. El Paso was to buy back any RIK gas that exceeded the daily volumes the Tribe had directed it to deliver in a given month (the "excess RIK gas"). 3/ (SOR at 4; Exh. D to SOR, Art. III, ¶ 3, at 5.) The price El Paso was to pay the Tribe for the repurchased gas was established in the 1975 Gathering Agreement. 4/

According to MMS' Field Report dated April 16, 1996 (Field Report), the 1975 "[Gathering] Agreement required the Tribe to tender for sale its excess RIK gas produced from the subject leases to El Paso at certain central delivery points or wellheads attached to El Paso's gas gathering system. 5/ The

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3/ Elsewhere, El Paso describes the excess RIK as gas volumes that exceeded the Tribe's daily, rather than monthly, needs. (Reply at 3.)

4/ The Deputy Commissioner explained that arrangement as follows: "Under the [1975 Gathering] Agreement, [RIK] gas in excess of the Tribe's needs was to be delivered to, and purchased by, El Paso. * * * Thus, El Paso was to take and deliver the Tribe's royalty portion to itself. The remaining gas was to be delivered to Conoco's purchasers." (Decision at 2.)

5/ The details of the delivery of the RIK gas are not entirely clear from the record. For example, it is not clear whether El Paso actually delivered the RIK gas to the Tribe, and if so, where it was delivered, or whether the Tribe delivered its RIK gas to the point were it was used.

Tribe delegated its obligations under the [1975 Gathering] Agreement to its agent Conoco, who was the designated operator of the subject leases." (Field Report at 1.) El Paso does not dispute that description of the relationship between the Tribe and Conoco, noting that the "Tribe has delegated its obligations under the [1975 Gathering] Agreement to its agent[,] Conoco." (Notice of Appeal to the Deputy Commissioner at 2.)

Thereafter, in response to the restructuring of the gas industry ordered by the Federal Energy Regulatory Commission (FERC) in the 1980s, on July 1, 1989, the Tribe and El Paso executed a confidential agreement which amended and modified the 1975 Agreement (1989 Amendment). 6/ Only the first four pages of that confidential agreement were submitted by El Paso, but other evidence in the record shows that the 1989 Amendment was intended to obtain relief for El Paso from the pricing terms of the 1975 Agreement. 7/ The parties executed the 1989 Amendment, which established new price terms, including prices for excess RIK gas. (1989 Amendment, Art. III.)

Of particular significance in the present matter, however, is that the 1989 Amendment also included a mutual release from claims arising from the 1975 Gathering Agreement prior to July 1, 1989. The release recited the following:

> In consideration for the El Paso Payment stipulated under Article I hereof, and except for any payment errors and

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6/ Paragraph VI of the 1989 Amendment recites that the parties agree that "the terms and conditions of this Amendatory Agreement, and of all negotiations and agreements entered into with respect hereto, are strictly and absolutely confidential * * * [and that] El Paso and the Tribe further acknowledge and agree that any breach of the confidentiality of this Amendatory Agreement, or of the negotiations associated therewith, will result in material and substantial harm to the other party." By Order dated July 10, 2001, we gave the Tribe notice of this proceeding and directed El Paso to serve the Tribe with copies of its Statement of Reasons, Exhibits, and Reply to MMS's Answer. We also directed MMS to serve the Tribe with a copy of its Answer. Additionally, we granted the Tribe leave to intervene if it so wished.

On Aug. 6, 2001, counsel for the Tribe responded as follows: "The Tribe has reviewed the pleadings and has determined that the government has adequately represented the Tribe's interests in this case." (Letter filed Aug. 6, 2001, by Jill E. Grant, Esq., Nordhaus Haltom Taylor Taradash & Bladh, at 1.) The letter did not address the confidentiality issue, however. The parties therefore are deemed to have waived their right to assert the confidentiality of the 1989 Agreement to the extent raised and argued herein.

7/ More specifically, El Paso proposed the 1989 Amendment as either a "buy-out" or "buy-down" of the 1975 Agreement: if the Tribe decided to cancel the 1975 Agreement, it would receive a lump sum "buy-out" payment; if the Tribe instead determined to renegotiate price terms to spot market prices, it would receive a lump sum "buy-down" payment. (Attachments 4, 5, and 6 to the Field Report.)

> discrepancies relating to volumes, BTU content, or ownership (which errors or discrepancies must be reported within one year following the date hereof), and except for any claims by the Tribe for non-payment of Tribal taxes, the Tribe hereby releases El Paso and El Paso hereby releases the Tribe from any and all obligations, claims or causes of action (whether known or unknown) that either party has asserted or could have asserted against the other for any period prior to July 1, 1989, which obligations, claims or causes of action arise in any way out of the [1975] Agreement between El Paso and the Tribe.

(1989 Amendment, Article II, at 1-2; emphasis added.)

In 1993, MMS performed an audit of the subject leases and determined that the excess RIK gas "was not always purchased by El Paso." (Decision at 2.) Instead, as the Deputy Commissioner held, the "audit of the subject leases found that excess RIK gas from Tribal leases had been delivered by El Paso and sold on the spot market by Conoco instead of being purchased by El Paso under the terms of the 1975 [Gathering] [A]greement." (Decision at 2; Answer at 2.)

As a result of the audit findings, MMS issued two orders. One order directed Conoco to reconcile gas deliveries that occurred during the period January 1987 through June 1988 and pay the Tribe for any RIK gas that was delivered to Conoco purchasers in error. Conoco appealed the order and subsequently settled the dispute with the Tribe, Conoco evidently paying the Tribe what it received from selling the gas on the spot market. See Decision at 2. However, Conoco also sought an order from MMS compelling El Paso to reconcile gas deliveries for the period January 1, 1987, through June 30, 1994.

Although the money that Conoco received from selling the gas on the spot market evidently was paid to the Tribe, that did not end the matter, presumably because that amount was less than what El Paso was obligated to pay to the Tribe under the 1975 Agreement. Accordingly, on September 30, 1994, MMS issued its second order directing "El Paso to pay the difference between what the Tribe should have received" under either the 1975 Gathering Agreement or the 1989 Amendment "and the spot market prices actually received" by Conoco and refunded to the Tribe. The order also directed El Paso to "pay for any RIK volumes not otherwise accounted for during the period covered by the order." (Decision at 2.)

The order determined that the audit of gas volumes "measured, gathered, purchased and/or transported by El Paso" from the subject leases revealed "that El Paso underallocated and did not pay the Jicarilla Apache Tribe for all wellhead gas which was made available by the Tribe for sale during the period January 1, 1987 through June 30, 1988." MMS therefore ordered El Paso to reconcile, calculate, and pay RIK volumes for the period January 1, 1987, through June 30, 1994, using the RIK prices set forth in the 1975 Agreement. (Answer at 2-3; order at 1.)

El Paso calculated and paid principal and accrued interest on excess RIK volumes for periods after July 1, 1989, the effective date of the 1989 Amendment, but appealed that portion of the order that pertained to discrepancies in gas volumes for the period prior to July 1, 1989, on the ground that those claims had been released pursuant to the 1989 Amendment. The Deputy Commissioner rejected that argument, holding that the 1989 Amendment "only settled obligations under the 1975 [Agreement]" and "d[id] not purport to settle obligations under the terms and conditions of the subject Tribal leases." (Decision at 4.) 8/

Arguments of the Parties

Before this Board, El Paso pursues the same argument it made before MMS, contending that the 1989 Amendment constituted a complete and mutual release from "claims arising under the Leases, as modified by the 1975 [Gathering] Agreement." (SOR at 13.) El Paso asserts that the two exceptions recognized by the 1989 Amendment -- for nonpayment of Tribal taxes and for discrepancies relating to gas volumes, BTU content, or ownership -- are irrelevant to the issues in this appeal. (SOR at 13-14.)

On the other hand, MMS argues that the exceptions to the release language in the 1989 Amendment are not irrelevant, because the additional amounts sought arise out of "discrepancies relating to gas volumes." (Answer at 4.) MMS concedes that the underpayment claim for such volume discrepancies was not made within 1 year of the date of the 1989 Amendment, but contends that "the parenthetical language of Article II" 9/ neither limits the exception nor supports a construction whereby a claim for settling discrepancies would fail if it was not reported within 1 year. On the contrary, MMS argues, the parenthetical phrase in Article II merely acts to impose an additional obligation to report discrepancies "promptly." (Answer at 7.)

MMS further explains its position:

> Such parenthetical language does not limit the exception of volume discrepancies to mean that "only volume discrepancies that

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8/ As El Paso describes it, the Deputy Commissioner started from the premise that El Paso's obligations under the leases were not modified by the 1975 Gathering Agreement and the 1989 Amendment, and thus the 1989 Amendment settled only obligations under the 1975 Gathering Agreement and did not affect El Paso's obligations under the leases. (SOR at 8.) The Deputy Commissioner concluded that, having failed to deliver the RIK gas to the proper party as required by the leases, El Paso was responsible for the additional royalty. (Decision at 4.) As will become apparent, we find no merit in the contention that the 1975 Gathering Agreement and 1989 Amendment did not modify the parties' obligations under the original leases.

9/ Again, the language of that exception is: "except for any payment errors and discrepancies relating to volumes, BTU content, or ownership (which errors or discrepancies must be reported within one year following the date hereof)."

> are reported within one year are covered." The correct interpretation of the parenthetical clause must be that "volume discrepancies are excepted from this agreement, and must be reported within one year."
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> Further, as Appellant possessed the relevant information about any volume discrepancies, this parenthetical clause strongly suggests that the reporting requirement rests necessarily with Appellant. To interpret the parenthetical clause to mean that paying for volume discrepancies could be avoided by failing to report them within one year could lead to the conclusion that Appellant could avoid its payment obligation by simply failing to report the discrepancy promptly. It is unlikely that this was the intent of the parties.

(Answer at 7-8.)

Analysis

[1] Resolution of this appeal obviously turns on interpretation of Article II of the 1989 Amendment. Because settlement agreements are contracts, the rules of contract construction govern their interpretation. Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784 (8th Cir. 1984); Air Line Stewards & Stewardesses Ass'n. v. Trans World Airlines, 713 F.2d 319, 321 (7th Cir. 1983). Federal contracts, including Indian contracts, are controlled by Federal law and follow the principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947); In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal. 1977), aff'd 625 F.2d 330 (9th Cir. 1980). Those contracts entered into by an Indian tribe with the approval of the Secretary of the Interior are subject to the same rules of interpretation as contracts entered into by private parties. White Sands Forest Products, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBLA 299, 303, 90 I.D. 396, 398 (1983). Asarco Inc., 116 IBLA 120, 126 (1990).

[2] The primary goal of contract interpretation is to determine the intent of the parties. ITT Arctic Services Inc. v. United States, 524 F.2d 680, 684 (Ct. Cl. 1975); 4 S. Williston, A Treatise On The Law Of Contracts § 601 (3d ed. 1961); 5 Corbin on Contracts § 24.6 (rev'd ed. 1998). It is well-established that a court, in attempting to interpret the intent of contracting parties, will be

> guided by the principles that "[t]he parties' intent must be gathered from the * * * and ascribing to the contract language "its ordinary and commonly accepted meaning," without twisted or strained out of context analysis, or regard to the subjective unexpressed intent of one of the parties. [Citations omitted.]

ITT Arctic Services, Inc. v. United States, supra.

To reiterate, the language at issue provides for mutual release from "any and all obligations, claims or causes of action (whether known or unknown) that either party has asserted or could have asserted against the other for any period prior to July 1, 1989, which obligations, claims or causes of action arise in any way out of the [1975 Gathering] Agreement * * *." What was excluded from the general release was "payment errors or discrepancies relating to volumes, BTU contents, or ownership (which errors or discrepancies must be reported within one year following the date hereof) * * *." (1989 Amendment, Art. II.) It is undisputed that El Paso did not buy back the Tribe's excess RIK in accordance with the terms of the 1975 Gathering Agreement. 10/ It is also undisputed that the Tribe's excess RIK gas was sold by Conoco to its purchasers. Consequently, it is clear that the MMS order pertains to both payment errors and ownership of the gas. On its face, the order thus concerns the subjects of the exception to the mutual release.

We conclude that the release contained in Article II of the 1989 Amendment in general terms is precisely what the parties intended it to be and what El Paso claims it is, viz., a mutual release of any and all claims, including royalty amounts, arising from the leases for all periods prior to the July 1, 1989, effective date. 11/ In fact, the language of Article II could not be plainer or more broadly cast, and thus we have no difficulty concluding that El Paso and the Tribe intended and agreed to release El Paso from any and all claims arising prior to July 1, 1989, in exchange for El Paso's payment to the Tribe, subject only to the terms of the exception.

[3] This brings us to the time limit stated in the release. MMS argues that the parenthetical clause merely established "the additional requirement to report discrepancies within one year." (Answer at 7.) We agree. MMS goes further, however, and argues that the clause should not be interpreted to mean that "only volume discrepancies that are reported within one year are covered." (Answer at 7.) We reject the distinction MMS would draw, and think it clear that the parties intended to resolve all their disputes relating to underpayments attributable to RIK gas, and to

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10/ In the proceedings before MMS, El Paso submitted the affidavit of Joseph D. Carter, an administrator in the Audit and Inquiry section of El Paso's Volume Accounting Department, dated Jan. 31, 1995. With his affidavit, El Paso submitted Carter's reconciliation of gas volumes delivered to Conoco and the Tribe during the period Jan. 1987 through June 1988. Carter disputed MMS' method of calculating the amount due for the over-deliveries of excess RIK gas (termed "oversettlement") and the gas volumes involved, but did not assert or suggest that there had been no oversettlement, or that such oversettlement did not involve excess RIK gas. (Attachment I to Brief in Support of Appeal to MMS filed Feb. 2, 1995.)

11/ As noted, El Paso submitted only the first four pages of the 1989 Amendment. If the complete Amendment contains anything more which could provide insight into the parties' intentions or the proper construction of Article II, we assume that MMS and/or the Tribe would have argued it and submitted the relevant portions thereof to support such argument, since the Tribe has as much knowledge of what was contemplated and intended when the release was negotiated and drafted as El Paso.

the extent that those claims were not known at the time the 1989 Amendment was executed, the parties each had 1 year to identify them, after which those claims would be extinguished pursuant to the 1989 Amendment. Were we to refuse to accord the 1-year time limit its plain meaning, the release would have little consequence as a full and final settlement of the parties' disputes. Moreover, it would have been easy enough to achieve the construction MMS now advocates: the parties could have omitted the parenthetical clause altogether. Since they did not, we must assume it was drafted with the intention of establishing a firm date by which claims were to be identified, thus fixing a date by which the parties' dispute would be fully and finally resolved. The resolution of this appeal thus depends on the nature and extent of the obligation to report discrepancies within 1 year of the effective date of the 1989 Amendment.

MMS suggests that the obligation rested with El Paso only. (Answer at 7-8.) El Paso dismisses the exceptions to the release as irrelevant to this appeal. (SOR at 13-14.) We do not agree with either party. In the absence of language stating or suggesting it, we see no basis for concluding that the obligation was El Paso's alone. The release required each party to do what was necessary to discover and raise any claims it could assert against the other within the 1-year period following execution of the 1989 Amendment. On appeal, MMS recognizes this construction of the release.

Thus, MMS contends that El Paso in fact was aware that there were volume discrepancies within 1 year of the effective date of the 1989 Amendment, because Conoco had performed a reconciliation of gas deliveries in December 1989, which determined that from 1981 through 1987 El Paso over-delivered excess RIK gas from the leases. That excess RIK gas was sold to Conoco's purchasers. Based upon those over-deliveries, Conoco paid El Paso $388,802.53. MMS argues that these facts gave rise to an affirmative obligation to disclose the discrepancies to the Tribe.

El Paso responds that "there was no basis for MMS' assumption that El Paso actually knew of any such discrepancies within one year after July 1, 1989." (SOR at 8.) In turn, this assertion is based upon El Paso's response to MMS' Field Report, in which El Paso contended that "[o]versettlements to Conoco could result from any number of discrepancies, including metered volume computation errors, pricing errors, regulatory pricing adjustments, and simple clerical errors, any of which could overstate both the volume delivered to Conoco and any excess RIK gas payment obligation to the Tribe." (Exh. I to SOR, at 13, n.2.) In summary, El Paso's position is that MMS has failed to demonstrate that it had actual knowledge of discrepancies, and that what evidence has been adduced by MMS could be explained as an innocent occurrence.

We cannot agree that the record establishes that, within 1 year following the date of the 1989 Amendment, El Paso received actual notice of discrepancies during the period January 1, 1987, through June 30, 1988, from either the Tribe or Conoco, its agent, or from its own sources.

The record contains three documents that are cited as showing that El Paso had such notice. First is a copy of a draft interoffice communication

from John W. Bowen of Conoco to a list of persons, none of whom is identified as being employed by El Paso, indicating that a letter would be sent to El Paso "along with reconciliation sheets showing results of [Conoco's] reconciliation of gas settlements received by Conoco from El Paso" for the Indian leases at issue here.

Second is a copy of a draft letter dated December 29, 1989, from Bowen to Jim Burns of El Paso, alluding to "several schedules which outline Conoco's reconciliation of settlements received or due from [El Paso] for the above referenced properties and covering the period 1989 through 1987 [sic] production." The draft letter refers to a "first set of schedules listing the seven items covered in our reconciliation, listing with each item the amount Conoco contends is either due El Paso or Conoco and an explanation of what each represents." A copy of that "first set of schedules" is in the record, as discussed below. The letter also refers to a "second set of schedules that provide support for the amount shown as due in the first set of schedules." Significantly, that supporting second schedule is not in the record. The draft letter includes a request that El Paso review the reconciliation and notify Conoco whether it agreed or disagreed with the reconciliation.

Third, as discussed above, is a copy of an "issue listing" of seven items involved in the reconciliation. As the supporting second schedule is not present, we are left to attempt to determine whether any of the listed items relate to the situation at issue in this appeal, namely, whether they reveal that Conoco delivered any excess RIK gas to its purchasers. See MMS Field Report at 2. In other words, we must determine whether these issues amounted, under the language of the 1989 Amendment, to a "report" of "payment errors and discrepancies relating to" El Paso's failure to buy back excess RIK or Conoco's sale of that excess RIK.

Items Nos. 1, 2, and 5 of the "issue listing" are obviously irrelevant, as they relate to time periods prior to January 1, 1987, the earliest date at issue herein. Likewise, Items Nos. 3 and 6 are amounts that El Paso owed to Conoco and thus do not relate to the present situation, where Conoco owed money to El Paso because Conoco sold excess RIK that El Paso should have purchased. 12/ Item 4 relates to an adjustment for an unspecified time where Conoco owed El Paso $17,725.33 for "[s]ettlement adjustments on the Northeast Haynes Unit meter #02-346 involving price and tax reimbursement discrepancies." It is not clear what time period is involved in that adjustment, and the situation here concerns neither a "price discrepancy" nor a "tax reimbursement." Item 7 relates to unspecified "settlement adjustments on the Jicarilla 20, 28, and 30 wells meter #02-335, for the period January through December 1987," where Conoco owed El Paso $94,184.97.

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12/ Items 3 and 6 both relate to adjustments where El Paso owed Conoco money because El Paso received gas volumes from the Northeast Haynes Unit without making settlements to Conoco. The fact that El Paso assertedly took production without paying Conoco is plainly not the situation at issue here.

Although the amount at issue roughly corresponds to that amount, 13/ there is simply no way to relate that adjustment to Conoco's sale of excess RIK.

Nothing shows that either document was actually finalized and transmitted. If it was not sent to El Paso, it cannot have provided the notice required by the 1989 Amendment. If El Paso was given notice through some other communication, it is not in the record before us. Even assuming arguendo that the letter was sent from Conoco to El Paso, it contains nothing that would have advised El Paso that it had failed to buy back excess RIK gas from the Tribe at any time prior to July 1, 1989, as required by the 1975 Agreement. At most, it refers generally to various underpayments and overpayments without specifying in any way the transactions to which they pertain.

Moreover, El Paso argues persuasively that "oversettlements" such as those that Conoco might have reported to El Paso in 1988 could have resulted from any number of innocent discrepancies. (SOR Ex. I at 13 n.2.) In the absence of any evidence establishing what the listed items referred to, we cannot make a finding that Conoco timely provided the notice required by the terms of the 1989 Amendment. In the absence of such notice, by the terms of the 1989 Amendment, the Tribe released El Paso from its obligation to pay that royalty. 14/ As we have observed in other contexts, it is incumbent upon the deciding official to ensure that the basis of the decision appealed is stated in the written decision and is demonstrated in the administrative record accompanying the decision. Kitchen Productions, Inc., 152 IBLA 336, 345 (2000), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the MMS' order is vacated insofar as it concerns payment of royalties for the period prior to July 1, 1989.

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T. Britt Price
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge

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13/ In 1994, Conoco paid the Tribe $89,574.03, which represented all RIK gas that could be identified as delivered to Conoco's purchasers for the period Jan. 1, 1987, to June 30, 1988.

14/ The Tribe was made aware of El Paso's defense against the propriety of MMS' order, and it neither entered its appearance nor offered to supplement the record with additional argument or evidence which would show or suggest that our conclusions are unwarranted. See n. 6 ante.